Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Dwain Lee Kirkland
Pro se
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QUESTIONS PRESENTED

Sequenced to the 11th Circuit ruling:

II. May a federal court decide a fact or the existence of a fact on summary judgment.

IV. May a federal court circumvent the public policy of the forum state in a diversity action.

V. May a defendant file his motion to extend one day after the deadline to answer the complaint.

VI. Do the Federal Rules of Civil Procedure trump the substantive law of the forum state.

VII. Is recusal under 28 U.S.C.A. §§ 144 automatic and mandatory.

VIII. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to freely amend the complaint.

IX. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to call an expert witness.

X. Does a rule allowing for extensions of time to file a "brief" also apply to a statement of facts on summary judgment.

XI. Which party actually prevailed on the motions for summary judgment.

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JURISDICTION

28 USCS § 1254. Courts of appeals; certiorari; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,....

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, U.S. Constitution: "[N]or be deprived of life, liberty, or property, without due process of law..."

Amendment VII, U.S. Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV, U.S. Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Middle District Rules

7.2 **RESPONSE.** Respondent's counsel desiring to submit a response, brief, or affidavits shall serve the same within twenty (20) days after service of movant's motion and brief.

6.2 **EXTENSIONS FOR FILING OF BRIEFS.** In civil, cases, the clerk of the court and his deputies are authorized to permit extensions of time to a date certain not to exceed fourteen (14) days for the filing of briefs.

STATEMENT

A. COURT RULINGS BELOW

En Banc Rehearing denied 10/20/2009(App.infra.1a).
11th Circuit opinion 08/19/2009(App.Infra.39a).
Reconsideration denied 9/3/2008(App.Infra.56a).
Judgment 7/11/2008(App.Infra.66a).
Final Order7/11/2008(App.Infra.67a).
Reconsideration denied 6/5/2008(App.Infra.69a).
Middle District opinion 5/5/2008(App.Infra.80a).

B. FACTS OF THE CASE

Complaint text as filed 08/04/2006 Athens-Clarke county superior court. Sworn to by Kirkland pursuant to Official Code of Georgia Annotated 9-10-111:

IN THE SUPERIOR COURT OF CLARKE COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	
v.	)	
	)	
	)	**Civil Action**
The Guardian Life Insurance	)	**File No.** _____
Company of America	)	

and Others,)
Defendants.)

CERTIFIED COMPLAINT

That I, Dwain Lee Kirkland, do hereby depose and swear on my oath that all of the following is true and correct to the best of my personal knowledge and belief at this time:

That my name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

That I, Dwain Lee Kirkland, do hereby depose and swear on my oath that the following Complaint consisting of the first unnumbered paragraph regarding jurisdiction, the last unnumbered paragraph regarding relief, and all 43 counts, in essence the entire complaint, is true and correct to the best of my personal knowledge and belief at this time.

That The Guardian Life Insurance Company of America is a corporation, maintains its Home Offices at 7 Hanover Square, New York, N.Y. 10036, is allowed by the Secretary of State to do business in the State of Georgia, maintains a Registered Agent therein, and agents for doing the business of the company throughout the state. One such agent is Paul Demersseman, Agent #PA916, of Peachtree Planning Corporation, 649 S. Millege Avenue, Suite #7, Athens-Clarke County, Georgia 30605. Such as is stated above, The Defendant The Guardian Life Insurance Company of America is subject to the jurisdiction of this court.

That on or about April 4th, 1984 Plaintiff Dwain Lee Kirkland entered into a Disability Insurance Policy/Contract with The Guardian Life Insurance Company of America. That such Policy/Contract contains a Cost of Living Rider, Liberalization Rider with Waiver of Premium, and Florida Statutory Rider.

2.

That Plaintiff Dwain Lee Kirkland of Item #1 above shall hereinafter be referred to as the "the Plaintiff."

3.

That The Guardian Life Insurance Company of America of Item #1 above and/or Others as styled above shall hereinafter be referred to as "the Defendants."

4.

That the Disability Insurance Policy/Contract of Item #1 above shall hereinafter be referred to as the "the Contract."

5.

That on or about February 1st, 1993, while the Contract was in force, the Plaintiff became disabled under said contract.

6.

That the Plaintiff was unaware of such Disability as related in Item #5 above at that time.

7.

That the Plaintiff was under the care of a Family Physician at the time of the Disability as related in Item #5 above.

8.

That the symptoms of the Disability as related in Item

#5 above were relayed to the Physician as related in Item #7 above with no resolution of the source of such symptoms.

9.

That the Plaintiff remained under the care of various physicians and health care facilities throughout the course of his disability with no resolution of the source of the symptoms as related in Item #8 above.

10.

That the Plaintiff had a short period of Residual Disability as outlined under the Contract from about November 1999 to December 2000.

11.

That such period of Residual Disability as related in Item #10 above was covered under the Contract.

12.

That such symptoms as related in Item #8 above recurred on or about December 31st, 2000 placing the Plaintiff in a hospital emergency room for twelve hours.

13.

That such symptoms as related in Item #'s 8 and 12 above were still unresolved.

14.

That about 2001 Plaintiff became so sensitive to his food products and environmental surroundings that he stopped consuming meat of all types and food additives of any kind. That Plaintiff also at that time discontinued his use of soap, deodorant, shampoo and toothpaste due to this sensitivity.

15.

That about 2002 Plaintiff became extremely sensitive to sources of Electromagnetism.

16.

That the symptoms as related in Item #'s 14 and 15 above were a worsening of Plaintiff's Disability.

17.

That the Plaintiff's condition further worsened to the point that about February 2003 the Plaintiff filed a disability claim under the Contract. That the Plaintiff was still uncertain of the source of his symptoms.

18.

That over a period of months the Plaintiff had and did use various techniques sometimes known as Body Work in an attempt to find the source of his symptoms.

19.

That in the course of the investigation as related in Item #18 above, the Plaintiff discovered that he was suffering from a plethora of sensitivities, some appearing allergic in nature while others were related to physical injury. That some of these sensitivities and injuries appeared to first manifest themselves at the age of seven and haunted the Plaintiff throughout his life resulting as well in three unnecessary surgeries which further injured the Plaintiff.

20.

That on or about August 29th, 2003 all of the information as related in Item #19 above along with pertinent Healthcare Providers was dispatched to Berkshire Life Insurance Company of America at a Massachusetts address via a carrier known as Federal Express. That

this information constitutes "Proof of Loss" under the Contract. That the Plaintiff, based on his investigations, placed the date of such "Loss" to February 1st, 1993.

21.

That Berkshire Life Insurance Company of America as related in Item #20 above is a wholly-owned subsidiary of the Defendants and/or an agent in a Master/Slave relationship to the Defendants.

22.

That Berkshire Life Insurance Company of America shall hereinafter be referred to as Berkshire.

23.

That Berkshire services the Contract as related in Item #1 above at the direction of the Defendants.

24.

That the Defendants are wholly responsible for the activities of Berkshire as related in Item #23 above.

25.

That Berkshire did not act on the Plaintiff's "Proof of Loss" as related in Item #20 above for over two full years. That instead, Berkshire engaged in various tactics popularly known as "stonewalling." That due to Berkshire's inaction on the claim, some of the Plaintiff's Medical Records pertinent to the "Proof of Loss" of Item #20 above were forever lost. That such activities of Berkshire and the subsequent loss of the Plaintiff's Medical Records due to such activities constitutes a permanent breech of contract that can never be mended short of payment of the entire claim. That the Plaintiff made the President of Guardian Life Insurance Company of America, the Defendants, aware of such

activity via Certified Mail. That the activities of Berkshire were by law activities of the Defendant.

26.

That about December 2004 the Plaintiff made the Defendants aware that he was also suffering Post Traumatic Stress Disorder. That the Defendants at that time paid a portion of the Plaintiff's claim to about March 2003.

27.

That the Defendants still have not paid all the Cost of Living Rider amounts due under the Contract to March 2003.

28.

That the Defendants still have not paid all the Waiver of Premium amounts due under the Contract to March 2003.

29.

That the Defendants are in a permanent breech of the Contract as related in Item #1 above for the amounts due under the Contract from February 1st, 1993 to about February 28th, 2003.

30.

That the Plaintiff provided "Proof of Loss" within the period for which Guardian was liable, which satisfies "within 90 days after the end of the period for which Guardian is liable" as per Page 9 of the Contract.

31.

That the Plaintiff supplied the Defendants with a subsequent and secondary narrative "Proof of Loss."

32.

That the Plaintiff demanded payment on the Contract via Certified Mail from the President of Guardian Life Insurance Company of America, the Defendants, on both "Proofs of Loss."

33.

That the Defendants are in Breech of the Contract as related in Item #1 above.

34.

That the Defendants may have sent persons onto Private Property in Florida who did not properly identify themselves or their business.

35.

That the Defendants repeatedly engaged in interpretation of the Contract--a legal contract, in apparent violation of Georgia Law--in their letters to the Plaintiff.

36.

That the Defendants apparently had persons call his sister's place of business who misrepresented their identity and their business.

37.

That the Defendants engaged in Fraud when they accepted Premium Payments from the Plaintiff but had no intention of honoring certain portions of the Contract.

38.

That the Defendants misfeasance and malfeasance as related in Item #'s 34 to 37 above are Interstate in nature.

39.

That the Contract is a simple contract under the laws of the states of Florida and Georgia.

40.

That the Contract contains a Florida Statutory Rider.

41.

That the statute of limitations as related in Item #'s 39 and 40 above runs to on or about August 29th, 2008.

42.

That all conditions of the law and the Contract, for payment of the claim, have been met.

43.

That the Plaintiff's Disability is continuing in nature and now appears to be a combination of Post Traumatic Stress Disorder with onset at the age of five due to Child Abuse; and Chronic Fatigue Syndrome with attendant sensitivities with onset at the age of six. That the Chronic Fatigue Syndrome was apparently brought about and continues due to infection with a known or unknown virus such as Epstein Barr.

WHEREFORE, the Plaintiff Dwain Lee Kirkland demands judgment against The Guardian Life Insurance Company of America and/or the Defendants, for the amounts due under the Contract from February 1st, 1993 to February 28th, 2003, approximately $115, 560, plus Cost of Living Rider amounts for that period, plus Waiver of Premium amounts for that period, plus Cost of Living Rider amounts for the period from March 2003 to the present, plus Waiver of Premium amounts for the period from March 2003 to the present, plus a 25%

Penalty on all amounts due the Plaintiff per State Law, plus costs, plus a reasonable attorney's fee.

s/ Dwain Lee Kirkland

By Dwain Lee Kirkland

08/03/2006

Date

Mary Fitzpatrick

Notary Public

My Comm. Expires: 05-15-2008

Affix notary seal here:

MARY FITZPATRICK
NOTARY
PUBLIC
Exp. May 15, 2008
MADISON, COUNTY, GA
(Stamped)

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

8/4/2006

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

The insurance contract text(PAGE NINE):

Notice of claim
Notice of claim must be given Guardian *within 30 days* after any loss for which it is liable occurs or starts, *or as soon after that as is reasonably possible.* Notice given by or for the insured, with his full name, date of birth or policy number, and address, will be deemed notice to Guardian, if given to Guardian at its home office, 201 Park Avenue South, New York, New York 10003; or to an authorized Guardian agent.

Claim forms
When it gets notice of claim, Guardian will send *claim forms for filing proof of loss.* If Guardian does not send such forms to the insured within 15 days after his notice, he may submit a written statement, *within the time required below,* that proves the occurrence, the nature, and the extent of the loss for which claim is made.

Time for filing proof of loss
Written proof of loss must be given Guardian at its home office or any agency office:

. for loss from disability *within 90 days after the end of the period for which Guardian is liable;*
. and for any other loss within 90 days of the date of loss.

If proof is not given within such time, *claim will not be denied or reduced if:*

. *it was not reasonably possible to give proof within such time;* and
. proof is given to Guardian as soon as possible.

In no case will Guardian pay benefits *if the delay in furnishing proof of loss is more than a year,* unless the insured has lacked legal capacity.(emphasis added)

District court omitted all contract language concerning notice of claim and claim forms from its ruling (Page2:10App.Infra.81a), instead using language from the proof of loss paragraph.

The three paragraphs read together yield Plaintiff Kirkland being required to give notice of claim *within 30 days...or as soon after that as is reasonably possible*; required to submit proper *claim forms for filing proof of loss...within the time required below;* required to give proof of loss *within 90 days after the end of the period for which Guardian is liable*; and the *claim will not be denied or reduced if: it was not reasonably possible to give proof within such time*; Plaintiff Kirkland only losing benefits *if the delay in furnishing proof of loss is more than a year[.]*

Clearly, the year within which insured has to file proof of loss does not begin running until the notice of claim mentioned in the earlier paragraph is filed.

To enter summary judgment against Kirkland, the district court looked at all facts surrounding Plaintiff's ten year inability to file notice of claim (the fact that his various disabilities went undiagnosed), then decided whether it was *reasonably possible* to give insurer notice of claim.

District court decided it was *reasonably possible* for

Kirkland to diagnose his own illnesses and timely, by 04/01/1993, give notice of claim to Defendant (partialSumm.J.05/05/2008Page29:11App.Infra.107a):

> Although the Court sympathizes with Plaintiff's plight, under the facts and circumstances of this case, no jury could conclude that it was reasonable for Plaintiff to suffer from this reportedly debilitating condition and remain almost constantly unemployed for ten years before contacting his disability income carrier.

Further (partialSumm.J.05/05/2008Page29:n.13App.Infra.108a).:

> The Court also notes that it would have been difficult for Plaintiff to comply with the terms of the Policy or understand that the Policy definition of "totally disabled" since his testimony indicates that he failed to look at the Policy until 2003. (Pl.'s Dep. 109:17-20.).

After initial perusal of the policy, no reasonable person would again look at it until he realized he might be disabled and the policy might in fact cover him.

In all cited precedent by the trial and 11th Circuit courts, the insured had been diagnosed with some type of illness he did not deem disabling. The sole exception being a chiropractor failing to have his injured shoulder seen or treated at all.

Kirkland sought treatment on numerous occasions never being diagnosed with any of his disabling illnesses.

Moreover, Defendant Guardian removed the case to federal court in Georgia then failed to answer the complaint or file a motion for extension within five days, instead filing the motion to extend and the answer on the sixth day after removal.

Guardian also did not file a verified answer in

district court pursuant to OCGA 9-10-111, thereby avoiding having an officer of the corporation swear to the truthfulness of their answer. Plaintiff Kirkland moved to strike the answer. The Middle District judge ruled Georgia's substantive law (Official Code of Georgia Annotated 9-10-111) was merely procedural and was trumped by Fed.R.Civ.P.11.

The middle district judge ordered a scheduling order be entered into. Plaintiff Kirkland moved the court for time to find an attorney, being unaware of federal removal statutes and unfit to litigate in federal court. The judge denied Kirkland's motion, entering Defendant Guardian's version of the scheduling order. Plaintiff, obviously, had no input in it.

Plaintiff Kirkland's expert witness was struck pursuant to the scheduling order. Plaintiff's amended complaint, including RICO allegations, and motion were denied pursuant to the scheduling order.

Both parties filed Summ.J motions. Partial Summ.J was entered against Kirkland for failure to self-diagnose his physiological conditions of Multiple Chemical Hypersensitivity(MCH) and Electromagnetic Field Hypersensitivity(EFH) and his mental disorders of Post Traumatic Stress Disorder, Depressive Disorder(NOS) and Personality Disorder(NOS) by July 1993, though there are currently no diagnosis codes for MCH and EFH because the medical establishment does not believe them to be physical in nature, though researchers currently believe them to be physical in nature and possibly predisposed by genetics.

The judge also ruled Plaintiff was not entitled to residual disability benefits, an issue not properly before the court. The judge also ordered a supplement on the issue of paid premium reimbursement to Plaintiff.

Plaintiff Kirkland filed a motion for reconsideration alleging the district court had violated his 5th, 7th and 14th Amendment rights by deciding facts that were the sole

province of a jury. Motion denied.

District court's final order disposed of all Plaintiff Kirkland's claims though one of Defendant Guardian's premium reimbursement checks later bounced.

Final Judgment entered.

Plaintiff Kirkland filed a final order reconsideration motion asking that Defendant Guardian deposit the amounts in question in the court's registry for disbursement to Plaintiff. Motion denied.

Kirkland filed a notice of appeal.

The 11th Circuit(08/19/2009)affirmed all the trial court's rulings except one, ruling that the issue of residual disability benefits was not properly before the trial court.

Plaintiff Kirkland timely filed a Petition for Rehearing En Banc. Petition denied 10/20/2009.

Case before this court on petition for writ of certiorari to 11th Circuit.

C. THE EXCEPTIONAL IMPORTANCE OF RULINGS IN THIS CASE

The issue in Section II is of exceptional importance due to Kirkland arguing in the 11th Circuit and the trial court that he was deprived of 5th Amendment Due Process and the plain language of the 7th Amendment. The argument on this issue (Appellant'sBriefPages10-18) runs nine pages. Kirkland cited (P.10)*Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* for the proposition that only a jury may decide a fact, even the existence of a fact, arguing judges, due to outright corruption, simply ignore both argument and fact. Kirkland also argued (P.13) pursuant to *Adamson v. People of State of California, 332 U.S. 46 (1947)* et. al that the 7th Amendment should apply to the states via the Due Process clause of the 14th Amendment. Kirkland cited (P.17) *Gideon v. Wainwright, 372 U.S. 335 (1963)* for the proposition that the odds of getting a fair hearing from a judge on summary judgment are as remote

as the odds of Gideon getting a fair trial while representing himself. Kirkland cited (P.17-18) *Whitaker & Rambo Interior v. Prudential Property, 510 F.Supp. 97 (1981)* at page 98 for the proposition that Georgia's substantive law requires a trial by jury be had in a removal action unless Kirkland waived it in writing. He did not.

Yet the 11th Circuit holds "Kirkland did not argue before the district court that a jury trial was required under the Georgia Constitution" and "he does not make any substantive argument that the grant of summary judgment denied him due process." To the extent that court holds Kirkland, a pro se appellant, did not make a "substantive argument" on these issues in his brief, such holding is contrary to the holding of this Court in *Conley v. Gibson, 355 U. S. 41, 45-46 (1957)* and *Haines v. Kerner, 404 U. S. 519, 520, 521 (92 SC 594, 30 LE2d 652),* and *Watson v. Ault, 525 F.2d 886 (5th Cir.1976).* To require a pro se appellant with an 11th grade education to plead his case at the level of a professional appellate lawyer is "arbitrary and unreasonable...and unjust" thus violates 5th Amendment Due Process. See *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.*

A trial and appellate court holding, such as this, is precisely why the 7th Amendment should be strictly adhered to.

The Panel in reaching its conclusion in Section IV, violated the 10th Amendment, encroached on the sovereignty of the state of Georgia and deprived the Plaintiff of 5th or 14th Amendment Due Process contrary to this Court's holding in *Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145 (1932);* and the Georgia Supreme Court's holding in Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003) wherein that court complains (P.86-87) the 11th Circuit has "erroneously interpreted" its public policy at least twice.

The 11th Circuit holding in Section V conflicts with

this Court in *Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).* Guardian's counsel filed neither his motion to extend nor his answer till after the deadline for filing the answer. The 11th Circuit attempts to obfuscate this issue by claiming it was only the answer that was filed one day late.

The Panel's holding in Section VI, violates the 10th Amendment, encroaches on the sovereignty of the state of Georgia and deprives Kirkland of 14th Amendment Due Process contrary to this Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).*

The 11th Circuit's holding in Section VII deprives Kirkland of the plain language of 28 USC 144 and 5th Amendment Due Process of Law.

The panel's holding in Section VIII deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney, of 5th Amendment Due Process of law contrary to this Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue, then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding also conflicts with *Foman v. Davis, 371 U.S. 178 (1962).*

The Panel's holding in Section IX deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney, of 5th Amendment Due Process contrary to this Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue, then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding is also contrary to Congressional intent.

The Panel in Section XI has used Florida State judge-made law to deprive Kirkland of his constitutional right to Art. III, Sec. 2, Para.1: "between Citizens of different States"; and his 7th Amendment right to jury trial in a diversity action in federal court contrary to this

Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).* The 11th Circuit's holding is arbitrary and unreasonable, and thus deprives Kirkland of 5th Amendment Due Process, in that it required Kirkland to self-diagnose both his Post Traumatic Stress Disorder and its co-morbid conditions of Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) when no doctor could.

D. QUESTIONS

II. May a federal court decide a fact or the existence of a fact on summary judgment.

(AppellantsBriefError1Page4): *The middle district court's holding that Plaintiff's claim was untimely as a matter of law was error as well as being repugnant to the 5th, 7th and 14th Amendments.* (ReplyBriefPage6.)

Expansive argument was made (AppellantsBriefError1Pages10-18) regarding adhering to the plain language of the 7th Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Definition of Jury Nullification, Black's Law, 8th Edition:

> *jury nullification.* A Jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

The Founding Fathers were aware of jury nullification. They were also aware of judge nullification. James Madison was a lawyer. Based on the plain language of the 7th Amendment, The Founding Fathers obviously believed jury nullification to be a righteous deed, judge nullification to be an iniquitous evil. *Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* is an example of jury nullification. Twelve learned men of 1913 were not stupid enough to believe Slocum was technically covered under the life insurance contract. They simply believed it was arbitrary and unreasonable to expect Mrs. Slocum to get a legally binding signature on a "blue note" from a man who was so mentally and physically disabled he died within four days. Jury nullification. Reasonable, just, due process.

Exxon v. Alabama is an example of judge nullification costing the people, the state of Alabama 3.5 billion dollars. In *Exxon,* the company filed for declaratory judgment shortly after it was caught with "irregularities" in royalty payments. A jury twice awarded the state of Alabama punitive damages for fraud. Both verdicts were overturned on appeal, the first for an evidence violation. In the second, the Alabama Supreme Court overturned the punitive damage award on grounds that Exxon had not defrauded Alabama because it had been caught and had given the $50,000,000 "irregularities" back. How Absurd. The whole case turned on "scienter." Did Exxon know its reading of the lease was not reasonable, did it know its reading of the lease was a fraud. The jury decided it did, twice. The end of the enquiry? No. Judge nullification. An arbitrary and unreasonable confiscation of the property of the people and state of Alabama. *See* Sue Bell Cobb's dissent *Exxon v. State of Alabama,* 986 So.2d 1093, 1134 (2007).

In passing, I am descended from Richard Cobb "The Gallant Scot," may be a blood relative of Chief Justice Cobb's husband, her children.

Federal criminal defendants are entitled to jury nullification. Per the plain language of the 7th Amendment, Kirkland is entitled to jury trial in federal court where the jury may engage in *jury nullification*. On a reasonable reading of the 7th Amendment, only a Civil Grand Jury could decide a motion for summary judgment. A closer reading of the common law extant at the time of the adoption of the 7th Amendment yields that only a federal trial court judge may decide sufficiency of evidence and order a new trial. And that is only after the judge has heard the entirety of the oral testimony with his own ears. Summ.J. is a legal travesty I have never seen, state or federal, properly applied.

Kirkland (AppellantsReplyBriefPage7:14):

> "It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease." *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001).*
>
> *Lane,* under Florida law, is factually equivalent to this case and also conforms to Due Process. Anything else is "arbitrary and unreasonable" and repugnant to due process per AMERICAN LAND CO. v. ZEISS in Error #3 below.

The 11th Circuit simply ignored Kirkland's citation of *Lane*. For a judge to simply ignore an argument and citation in any court, fail to take up and refute it, is an omission that falls short of proper process and thus deprives a litigant of 5th Amendment Due Process of Law. Judge nullification is often accomplished by simply ignoring arguments and citations that cannot be refuted without drawing attention to the case. An experienced Georgia appellate lawyer remarked, "so erroneous as to arouse suspicion."

Kirkland (Appellant'sReplyBriefPage8:15):

> I intended a further discussion of summary judgment being repugnant to the 5th, 7th and 14th Amendments, requiring 1,570 words. I was confined to 7,000 words. This ground was also covered extensively in a motion for reconsideration (Doc.57).

Thus the 11th Circuit's holding that I did not make a proper Due Process argument. Bazaar.

In closing:

> The first maxim of a man who loves liberty, should be never to grant to rulers an atom of power that is not most clearly and indispensably necessary for the safety and well being of society.

Richard Henry Lee, great-uncle of Robert E. Lee and signer of The Declaration of Independence.

IV. May a federal court circumvent the public policy of the forum state in a diversity action.

(Appellant'sBriefError3Page20): *The middle district court's holding that the doctrine of lex loci contractus is applicable to this case is error.* (ReplyBriefPage10.)

Can substantive law in any state be used in Fed.R.Civ.P.56SummJ. to decide sufficiency of evidence? Rule 56 is procedural in federal court and must comply with the 5th & 7th Amendments. Judge-made state law does not, at present, have to comply with the 7th Amendment. Compliance with the 5th Amendment on Rule 56 would evoke precedent in the 11th Circuit, this Court and other circuits.

Kirkland (ReplyBrief Pages17-18):

"There is considerable authority from other jurisdictions that a cause of action does not accrue under such circumstances until the plaintiff discovers or with reasonable diligence should have discovered not only the injury but the cause of the injury. See R. J. Reynolds Tobacco Co. v. Hudson, 314 F2d 776 (5th Cir. 1963); Miller v. Beach Aircraft Corp., 204 Kan. 184 (460 P2d 535) (1969); Wiggington v. Reichold Chemicals, Inc., 133 Ill. App. 2d 776 (274 NE2d 118) (1971); Breaux v. Aetna Cas. &c. Co., 272 FSupp. 668 (E. D. La. 1967); Goodman v. Mead Johnson & Co., 388 FSupp. 1070 (D. N.J. 1974); Thrift v. Tenneco Chemicals, Inc., 381 FSupp. 543 (S. D. Tex. 1974); Gilbert v. Jones, 523 SW2d 211 (Tenn. Ct. App. 1974); G. D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22 (122 Cal. Rptr. 218) (1975); Allen, Roman v. A. H. Robins Co., Inc., 518 F2d 970 (5th Cir. 1975) (Tex.); Raymond v. Ely Lilly Co., 117 N.H. 164 (317 A2d 170) (1977); Harig v. Johns-Manville Products, 284 Md. 70 (394 A2d 299) (1978); Insurance Co. of North America v. Forty-Eight Insulations, Inc., 451 FSupp. 1230 (E.D. Mich. 1978); Schiele v. Hobart Corp., 284 Or. 483 (587 P2d 1010) (1978)." *KING v. SEITZINGERS, INC. et al., 62653 (160 Ga. App. 318) (287 SE2d 252) (1981).*

The 11th Circuit must adhere to precedent from The 5th Circuit.

Can judge-made law in Florida or Georgia trump 5th Circuit precedent regarding the discovery rule. Can judge-made law in either state force Kirkland to use his broken brain to self-diagnose his broken brain, force him to self-diagnose PTSD and its co-morbid conditions of Electromagnetic Field Hypersensitivity (EFH) and Multiple Chemical Hypersensitivity (MCH) in order to report them to an insurance company?

See Kirkland's affidavit (supportingEnBancApp.Infra.30a) concerning when he was

diagnosed with a disabling condition of any kind.

11th Circuit cites *Reliance,* 1940, and *N. Am. Ins. Co.,* 1909. Is anyone watching this? Both cases are so out of date they have absolutely no bearing on current law. But *Reliance* contains the discovery rule:

> It seems to be settled law in Florida that a default in serving notice or proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or unreasonable and the insured has not failed to use due diligence.

Reliance Life Ins. Co. of Pittsburgh, Pa. v. Lynch. (197 So. 723, 724) (1940).

Kirkland could not report his disability to the insurance company until he was diagnosed. Guardian has never argued Kirkland did not exercise "due diligence."

Again, 11th Circuit has deprived Kirkland of 5th Amendment Due Process by totally ignoring his argument. 11th Circuit does not mention Kirkland argued (ReplyBriefPages10-21), citing a dozen authorities, that Florida's judge-made law [see *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1287 (S.D.Fla.2001)]* presumes prejudice and thus is contrary to Georgia's public policy.

District court (PartialSumm.J.5/5/2008Page30:1App.Infra.108a):

> The fact that Plaintiff failed to timely file his notice of claim and proof of loss does not necessarily end the Court's inquiry. Rather, under Florida law, failure to comply with these provisions merely creates a presumption that the insurer was prejudiced.

Georgia's judge-made law applies the discovery rule:

The time limitations in policies of insurance requiring a report of incident 'as soon as practicable' are subject to a factual determination. 'The questions of the sufficiency of the excuse offered, and the diligence of the beneficiary in giving the notice after the removal of the disability, are generally questions of fact, to be determined by the jury, according to the nature and circumstances of each individual case.' North American Accident Ins. Co. v. Watson, 6 Ga. App. 193, 196 (64 SE 693); Pilgrim Health &c. Ins. Co. v. Chism, 49 Ga. App. 121 (3) (174 SE 212); Hulme v. Mutual Benefit &c. Assn., 60 Ga. App. 65 (2 SE2d 750).

When the testimony of record indicates that the first time any substantial evidence of a claim came to the attention of the principal insured he notified the agent as indicated in Division 1 of this opinion, **about 19 months after occurrence of the incident giving rise to the claim, it was not error to submit the issue of reasonableness of excuse to the jury, and the jury finding was supported by the evidence.**

NORFOLK & DEDHAM MUTUAL FIRE INSURANCE COMPANY v. CUMBAA., 47646. 128 Ga. App. 196, 198-199 (2) (196 SE2d 167) (1973).

Kirkland again asked the 11th Circuit (ReplyBriefPage20:4) to certify a question to Georgia's Supreme Court. Instead, 11th Circuit actually cites *Convergys Corp. v. Keener* (582 S.E.2d 84, 86) (Ga. 2003) wherein Georgia's Supreme Court complains of previous "public policy" decisions made in its behalf. *Convergys:*

> Since the injured party in this case is a Georgia resident, compare Cunningham v. Equitable Life Assur. Society of the United States, 652 F2d 306 (1) (2d Cir. 1981), we likewise reject Federal's argument that we should afford

comity to Florida's public policy in deterring aggravated conduct in that state by disallowing insurance coverage for punitive damages. Florida's public policy is not paramount. This case involves a Georgia corporation's liability to a Georgia resident, so the public policy of Georgia is superior to that of Florida. See General Motors Corp. v. Nat. Auto Radiator Mfg. Co., 694 F2d 1050 (6th Cir. 1982); Andrews, supra. Georgia's public policy concerns are the protection of both the injured party and the insured. See GEICO, supra. This case, as others, turns on its own particulars.

FEDERAL INSURANCE CO. v. NATIONAL DISTRIBUTING CO., INC.; and vice versa, A91A1709, A91A1710 (203 Ga. App. 763) (2) (417 SE2d 671) (1992).

Pursuant to *Federal,* Georgia holds Defendant Guardian a resident Corporation:

> Additionally, in Allstate Ins. Co. v. Klein, 262 Ga. 599 (422 SE2d 863) (1992), the Supreme Court of Georgia examined the definition of nonresident in the Georgia Long Arm Statute (OCGA 9-10-90) and held that "a corporation which is 'authorized to do or transact business in this state at the time a claim' arises is a 'resident' for purposes of personal jurisdiction over that corporation in an action filed in the courts of this state. As a resident, such a foreign corporation may sue or be sued to the same extent as a domestic corporation." Id. at 601, n. 2 and accompanying text.

Harry S. Peterson Co., Inc. v. National Union Fire Insurance Co., A93A0564. (209 Ga. App. 585) (434 SE2d 778) (1993) cited by *Federal.*

Federal is the closest Georgia has come to the circumstances of this case, though not precise enough. I twice asked the 11th Circuit to certify this question to

Georgia's Supreme Court.

11th Circuit deprived Kirkland of his 10th Amendment right to live in Georgia under its constitution, its laws, free of federal interference; and as well encroached on Georgia state sovereignty. 11th Circuit conflicts with this Court in *Bradford Electric Light Co., Inc. v. Clapper,* 286 U.S. 145 (1932); and Georgia's Supreme Court in *Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003).*

V. May a defendant file his motion to extend one day after the deadline to answer the complaint.

(Appellant'sBriefError4Page22): *The trial court's holding that allowed Defendants to file their response to the complaint after the deadline, due to inadvertence, was error.* (ReplyBriefPage21.)

11th Circuit cites *Pioneer* for holding a defendant may file his motion to extend the time to answer one day after the deadline to file the complaint. *Pioneer* itself cites *Re South Atlantic* and *Klapprott v. United States:*

> Thus, in In re Underground Utility Construction Co., 35 B.R. 588 (Bankr.S.D.Fla.1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimely filing was the result of his failure to mail his claim to the proper address. *In Re South Atlantic Financial Corp., 767 F.2d 814, 817 (1985).*

11th Circuit's holding is contrary even to *In Re South Atlantic.* Moreover, comparing a late filing in a bankruptcy case to late filing an answer to a complaint is apples to oranges. Answering a complaint is governed by Fed.R.Civ.P. In *Klapport,* this Court held in order to show excusable neglect under Fed.R.Civ.P.60(b), Klapport had to

be destitute, and in jail:

> For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings.

Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).

Defendant's counsel was neither destitute nor in jail at the time he inadvertently, incorrectly marked his desk calendar. 11th Circuit holding conflicts with this Court. This Court has NEVER, to my knowledge, ruled a defendant may file his motion to extend after the deadline for the answer. If they had, 11th Circuit would have cited it.

VI. Do the Federal Rules of Civil Procedure trump the substantive law of the forum state.

(Appellant'sBriefError5Page23): *The trial court's holding that allowed Defendants to file an unverified response to Plaintiff's complaint was error.* (ReplyBriefPage22.)

11th Circuit cites *Esfeld* holding Guardian did not have to adhere to Georgia's substantive law, OCGA 9-10-111. *Esfeld* (Page1306) cites *Gasperini:*

> Informed by these decisions, we address the question whether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court"?

Id., at 468, n. 9.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).

Failure to apply Georgia's Substantive law, OCGA 9-10-111, in federal court discriminates "against citizens [Kirkland] of the forum state," and made Guardian "choose the federal court" because OCGA 9-10-111 required an officer of Guardian to swear no "interstate fraud," Mail/Wire fraud, was committed.

VII. Is recusal under 28 U.S.C.A. §§ 144 automatic and mandatory.

(Appellant'sBriefError6Page23): *6. Trial court Judge Clay Land's refusal to be recuse himself under either section of the federal code was error.* (ReplyBriefPage22.)

11th Circuit (Page9:1App.Infra.45a): "a district judge's decision on whether to recuse himself." 11th Circuit is ruling as if Kirkland filed under 28 USC 455 but admits Kirkland actually filed under 28 USC 144. 11th Circuit cites *Hamm:*

> Two statutes govern the recusal of a federal district judge. 28 U.S.C.A. §§ 144, 455. . Section 144 provides for recusal when a party files a timely and technically correct affidavit and motion alleging the judge before whom the matter is pending is personally biased or prejudiced against him or in favor of an adverse party. Section 455 sets forth a general rule that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned, 28 U.S.C.A. § 455(a), and also several specific situations in which a judge must do so. 28 U.S.C.A. § 455(b).
>
> The plaintiff in this case invoked neither statute in the district court....

Hamm v. Members of BD. of Regents of State of Fla., 708 F.2d 647, 651 (1983).

11th Circuit admits Kirkland invoked 28 USC 144 in district court. Bias does not have to be proven. Recusal is "mandatory" and "automatic" if affidavit is "technically correct." See *U.S. v. Sykes*, C.A.7(Wis.)1993, 7 F.3d 1331; also *Brotherhood of Locomotive Fireman and Engineman v. Bangor & A.R. Co.*, C.A.D.C.1967, 380 F.2d 587.

11th Circuit deprived Kirkland of the plain language of 28 USC 144 and 5th Amendment Due Process.

VIII. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to freely amend the complaint.

(Appellant'sBriefError7Page24): *The trial court's holding that Plaintiff could not amend his complaint to include RICO damages was error.* (ReplyBriefPage22.)

Kirkland (ReplyBriefPage22:17):

> Kirkland's Motion (Doc.26). His Reply (Doc.41,P.2-8) cites seven authorities, most particularly the Middle Districts own case *Cowart v. Metropolitan Life Ins. Co., 444 F. Supp. 2d 1282, 1295 (M.D. Ga. 2006)* granting plaintiff's motion to amend where defendant was "on notice" of a potential claim since the inception of the lawsuit.)."

11th Circuit cites *Smith*. This case is distinguishable from *Smith* for the following reasons: Smith agreed to the scheduling order, Kirkland had it forced on him while he moved the district court for time to find an attorney. Smith was not looking for an attorney. Smith did not file in state court in ignorance of a federal removal statute. Smith had been working and was not 100% disabled both mentally and physically. In *Smith*, the court did not rule on his

motion but reserved it and summary judgment on the main claim made the motion moot. Kirkland filed both the motion and the amended complaint at the same time.

Page 1366 *Smith v. School Bd. Of Orange County* (487 F.3d 1361) (11th Cir. 2007) cites *Sosa:*

> The record makes clear that Sosa's failure to comply with the court's scheduling order resulted from a lack of diligence in pursuing her claim.

Sosa v. Airprint Systems, Inc. (133 F.3d 1417, 1419) (11th Cir. 1998).

Sosa was represented by counsel. Kirkland showed no "lack of diligence," just complete inability due to disability and not being a lawyer.

Notes of the Advisory Committee 1983 amendments Fed.R.Civ.P.16:

> Para.2: "In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome."
> Para.3: "Second, the result frequently is nothing but a formal agreement on minutiae."
> Para.4: "When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. ...But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case."
> Para.5: "However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated."
> Subdivision (e), Pretrial Orders, para3: "Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, e.g., Clark v. Pennsylvania R.R. Co., 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard

> **for amending the pretrial order probably are less important than the meaning given them in practice.** By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next."

To issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically, Plaintiff, a scheduling order, not even "**mandated**" by congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to this Court's holding in *American Land Co. v. Zeiss,* 219 U.S. 47 (1911) at P.96. Putting unnecessary restrictions on amending a complaint also conflicts with *Foman v. Davis,* 371 U.S. 178 (1962).

If both this error and Summ.J. are reversed, Kirkland can then pursue the entirety of his claim.

IX. Does a forced scheduling order take precedent over a *pro se* plaintiff's right to call an expert witness.

(Appellant'sBriefError8Page26): *The trial court's holding that Plaintiff's expert witness would be struck for failure to timely comply with Rule 26 notices while Defendants' expert witnesses would not be struck for the same infraction was error.* (ReplyBriefPage23.)

11th Circuit argues it is my *pro se* status preventing me from "litigating" this case. IT IS MY DISABILITY. I also missed the deadline for filing Record Excerpts in 11th Circuit. *See* FORTY-ONE count affidavit in Motion to Reinstate for how my multiple disabilities affect my ability to function.

Here again, to issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically, Plaintiff, a scheduling order, not even "**mandated**" by

congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to this Court's holding in *American Land Co. v. Zeiss,* 219 U.S. 47 (1911) at P.96. This holding is also contrary to Congressional intent.

If both this error and Summ.J. are reversed, Kirkland can then pursue the entirety of his claim.

X. Does a rule allowing for extensions of time to file a "brief" also apply to a statement of facts on summary judgment.

(Appellant'sBriefError9Page26): *The trial court's holding that Defendants' untimely factual response to Plaintiff's motion for summary judgment was in fact timely was error.* (ReplyBriefPage23.)

District Court (PartialSumm.J.5/5/2008Page11:9App.Infra.90a):

> The briefing schedule was necessarily altered by the fact that Plaintiff filed his brief on August 13th. ...Because of this alteration, Guardian's brief was due on September 5, 2007, twenty-three days after service of Plaintiff's brief. However, the briefing schedule was again altered on August 31, 2007, when Guardian requested an extension to file its response. This extension was also permissible. ...Local Rule 6.2 permits the clerk of court and his deputies "to permit extensions of time to a date certain not to exceed fourteen (14) days for the filing of briefs." Because the deputy clerk granted Guardian's request for an extension, Guardian's response to Plaintiff's motion for summary judgment was due on September 14, 2007. Guardian filed its response and statement of disputed material facts on that day.

What district court accomplished with this ¾ page jig was

allowing Defendant Guardian to file a "response" under Local Rule 6.2 that, by its plain language, only applies to "the filing of briefs." Guardian's "response," its statement of facts, was due on "September 5th, 2007" pursuant to Local Rule 7.2. The clerk had no authority under Local Rule 6.2 to give Guardian another 14 day extension for anything except their "briefs." Both Local Rules 7.2 & 6.2 are reproduced in Constitutional and Statutory Provisions Involved (Page2) above.

XI. Which party actually prevailed on the motions for summary judgment.

11th Circuit combined errors 10 and 11 from Appellant's Briefs:

(Appellant'sBriefError10Page27): *The trial court's granting of partial summary judgment in favor of Defendants was error.*(ReplyBriefPage23.)

Notice of Claim: 11th Circuit cited *Nat'l Gypsum,* a 1982 surety bond case, Florida's Supreme Court, and completely distinguishable from this case.

More on point is *American,* The Florida Second District Court of Appeal:

> '[A]s soon as practicable' has been construed to mean that notice is to be given with reasonable dispatch and within a reasonable time *in view of all the facts and circumstances of the particular case.* ...[It] being frequently stated that prejudice is presumed under these circumstances. *This does not mean upon a showing of delay, alone, the insurer walks out of court free of potential claims.* (Emphasis added.)

American Fire and Casualty Co. v. Collura (163 So.2d 784, 792) (1964).

Precisely on target is *Lane* originally cited by

Guardian without careful reading:

> It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease.

Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001).

The United States District Court for the Southern District of Florida encompasses Miami-Dade County where the contract was delivered in 1984.

Under Florida law it was not "reasonably possible" for Kirkland to give notice to Guardian until his symptoms were "diagnosed" as Post Traumatic Stress Disorder or its co-morbid conditions Electromagnetic Field Hypersensitivity (EFH), Multiple Chemical Hypersensitivity (MCH). Kirkland's disability began in 1993; he immediately informed Guardian in 2004 when first diagnosed with any disabling condition. *See* Kirkland's affidavit supporting Petition for En Banc Rehearing(App.Infra.30a).

11th Circuit engages a bit of prevarication:

> Kirkland knew that he was suffering from a number of physical symptoms.

None of those symptoms however, while seeing numerous doctors, a hospital emergency room for twelve hours, and otherwise exercising due diligence, was ever diagnosed.

I have encountered much adversity in my life. I have been beaten in the street by members of Georgia law enforcement handcuffed. But perhaps the worst beating of all is the beating I have taken in Georgia's courts.

(Appellant'sBriefError11Page28): *The trial court's denial of summary judgment in favor of Plaintiff was*

error.(ReplyBriefPage24.)

11th Circuit
(11thCircuitRulingPage12:21App.Infra.48a):

> However, he does not discuss the fraud or RICO claims on appeal, but, instead, only refers to documents filed in the district court.

Kirkland specifically raised the argument concerning RICO at error #10 (Appellant'sInitialBriefPages27-28) asking the 11th Circuit to review his motion for summary judgment, specifically the affidavit. The Panel cites *Four Seasons* which in turn cites *APA Excelsior III L.P.:* [W]e do not consider claims not raised in a party's initial brief and made for the first time at oral argument." *APA Excelsior III L.P. v. Premiere Technologies (476 F.3d 1261, 1269) (11th Cir. 2007).*

Kirkland raised the argument in his "initial brief."

Kirkland further argued "Negligence, Breech of Contract & Fraud/RICO"(ReplyBriefError11Pages24-27) citing five forum state authorities and two sections of the Georgia code.

So much for not raising "fraud or RICO claims on appeal."

It's very simple. If an insurance company intentionally refuses to request medical records for three years(August2003-May2006), it is guilty of "scienter" and fraud for the value of the claim. If it fails through negligence to request medical records for three years then denies your claim for lack of evidence, it is guilty of negligence for the value of the claim. Both of these claims are allowable under Georgia law.

Further
(PartialSumm.J.5/5/2008Page6n.4App.Infra.85a):

> [4]Guardian admits that the payment was, in fact,

incorrect and should have been in the amount of $9,720.00 instead of $1,630.00. The company inadvertently omitted a $900 per month social insurance substitute and paid Plaintiff only his $180 per month disability benefit. (See Ex.14toDef.'sMot.forSumm.J.4.)

A reasonable jury could find this to be a fraud in the amount of $8,090.00. Kirkland caught Guardian like Alabama caught Exxon.

Further (PartialSumm.J.5/5/2008Page31:25App.Infra.109a):

With respect to Plaintiff's claim for additional cost-of-living adjustments, Guardian contends that after reviewing Plaintiff's claim, "Berkshire determined that additional cost-of-living benefits of $917.04 were owed and the additional benefits were paid to plaintiff on July 18, 2007."(FanielAff.IPara.23.)

"[W]ere paid...2007" after Kirkland sued them. *See* complaint (Page2) above.

Further (PartialSumm.J.5/5/2008Page32:20App.Infra.110a):

With respect to Plaintiff's refund and waiver of premium claims, however, the present record contains insufficient evidence to allow the Court to resolve the matter on summary judgment. Plaintiff avers that there was never a premium waiver and that he has "constantly paid the premiums."(Pl.'sDep.210:17-23;Pl.'sAff.IIPara.24.) Lance Faniel, Berkshire's Claims Manager, avers that "[w]hen Berkshire determined that [Plaintiff] was entitled to disability benefits, the company refunded the premiums that he had paid since his date of disability in 2003. [Plaintiff's] premiums have been waived since then, and no additional premiums have been received by

Berkshire."(FanielAff.IPara.24.)

No premium waiver till Kirkland sued them. *See* complaint (Page2) above.

Kirkland quoted *Cesnik v. Edgewood Baptist Church,* 88 F.3d 1902 (11thCir.) extensively (Appellant'sBriefError11Page28:16).

Kirkland (ReplyBriefError10Page23:19):

Guardian's motion (Doc.27) submitted no admissible evidence that Kirkland was not disabled as of 1993. Kirkland submitted admissible evidence (Doc.31,Para.1,(a)to(e))that he was. Georgia courts allow an insured to swear to his own disability. See *Franklin Life Insurance [v. Ransom 33766 (85 Ga. App. 659) (1) (69 SE2d 905) (1952)]*

District court (PartialSumm.J.5/5/2008Page9n.6App.Infra.88a):

> For purposes of the pending motions, Guardian does not appear to contend that Plaintiff was not disabled; rather, it bases its motion for summary judgment on the fact that Plaintiff failed to comply with the foregoing conditions.

Guardian failed to factually rebut Kirkland's motion on this issue. Kirkland prevails.

E. OTHER RELIEF

Plaintiff/Petitioner prays for other and further relief as may be due and granted under the rules of this Court and the laws of the United States.

REASONS FOR GRANTING THE PETITION

Justice.

CONCLUSION

Mr. Justice Story:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . .

Parsons v. Bedford, 3 Pet. 433, 446, 7 L. ed. 732, (1830).

Respectfully submitted,

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January 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 20 2009
THOMAS K. KAHN
CLERK
(Stamped)

No. 08-15699-AA

DWAIN LEE KIRKLAND,

Plaintiff-Appellant,

versus

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BIRCH, BLACK and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Susan H. Black

ORD-42

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
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(Stamped)

No. 08-15699-A

DWAIN LEE KIRKLAND,

PLAINTIFF-APPELLANT

v.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
AND OTHERS,

DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

PLAINTIFF/APPELLANT'S PETITION FOR EN BANC REHEARING

Respectfully submitted by:

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Pro se

U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Dwaine Lee Kirkland *vs.* The Guardian, Appeal No. 08-15699-A

11th Cir. R. 26.1 (see reverse) requires that a Certificate of interested Persons and Corporate Disclosure Statement must be filed by the appellant with this court within 10 days after the date the appeal is docketed in this court, and must be included within the principal brief filed by any party, and included within any petition, answer, motion or response filed by any party. **You may use this form to fulfill this requirement.** In alphabetical order, with one name per line, please list the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

(please type or print legibly):

1. The Berkshire Life Insurance Company of America, a mutual company, Massachusetts, Defendant's subsidiary

2. Carter & Ansley, LLP, Atlanta, Georgia, Defendant's Law Firm

3. H. Sanders Carter, Jr., Esq., Defendant's Counsel

4. Andrea K. Cataland, Esq., Defendant's Counsel

5. The Guardian Life Insurance Company of America, a mutual company, New York, defendant

6. Michael Patrick Johnson, Esq., Defendant's Counsel

7. Dwain Lee Kirkland, Plaintiff

8. Clay D. Land, Judge, Middle District of Georgia

9. Lisa Renee Richardson, Esq., Defendant's Counsel

10. Smith, Moore, Leatherwood, LLP, Atlanta, Georgia, Defendant's Law Firm

District Court Number: 06-00107 CV-CDL-3

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U.S.C.A. DOCKET NO. 08-15699-AA
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DW AIN LEE KIRKLAND
Plaintiff-Appellant

v.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

Defendant-Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

So that the judges of this Court may evaluate possible disqualification or recusal, The Guardian Life Insurance Company of America certifies that the following parties have an interest in the outcome of the case:

Carter & Ansley LLP, which merged into Smith Moore Leatherwood LLP (attorneys for The Guardian);

Carter, Jr., H. Sanders (attorney for The Guardian);

Cataland, Andrea K. (attorney for The Guardian);

The Guardian Life Insurance Company of America, a mutual insurance company (defendant-appellee);

(C1)

Johnson, Michael P. (attorney for The Guardian);

Kirkland, Dwain Lee (pro se plaintiff-appellant);

Land, Clay D. (district court judge);

Richardson, Lisa R. (former attorney for The

Guardian); and Smith Moore Leatherwood LLP (attorneys for The Guardian).

The following are subsidiaries of The Guardian:

Berkshire Life Insurance Company of America
First Commonwealth, Inc.
Guardian Baillie Gifford Limited
Guardian Investor Services LLC
Guardian Trust Company, FSB
Innovative Underwriters, Inc.
Managed Dental Care (California)
Managed DentalGuard, Inc. (New Jersey)
Managed DentalGuard, Inc. (Texas)
Park Avenue Life Insurance Company
Park Avenue Securities LLC
RS Investment Management Co. LLC
The Guardian Insurance & Annuity Company, Inc.

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III.

APPELLANT'S PETITION FOR EN BANC REHEARING

This judgment was filed August 19th, 2009 making this Petition due on Wednesday September 9th, 2009. It is being filed on or before September 9th, 2009.

STATEMENT OF THE EXCEPTIONAL IMPORTANCE OF RULINGS IN THIS CASE

The issue in Section II is of exceptional importance due to Kirkland arguing both in this Court and in the trial court that he was deprived of 5th Amendment Due Process and the plain language of the 7th Amendment. The argument on this issue in Appellant's brief runs from P.10-18, nine pages. Kirkland cited *Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* at page 10 for the proposition that only a jury may decide a fact, even the existence of a fact, arguing that judges, due to outright corruption, simply ignore both argument and fact. Kirkland also argued at P.13 that pursuant to cases such as *Adamson v. People of State of California, 332 U.S. 46 (1947),* the 7th Amendment should be applied to the states via the Due Process clause of the 14th Amendment. At P.17 Kirkland cited *Gideon v. Wainwright, 372 U.S. 335 (1963)* for the proposition that the odds of getting a fair hearing from a judge on summary judgment are as remote as the odds of Gideon getting a fair trial while representing himself. At P.17-18 Kirkland cited *Whitaker & Rambo Interior v. Prudential Property, 510 F.Supp. 97 (1981)* at page 98 for the proposition that Georgia's substantive law requires that a trial by jury be had in a removal action unless Kirkland waived it in writing. And he did not.

Yet the Panel holds "Kirkland did not argue before the district court that a jury trial was required under the Georgia Constitution" and "he does not make any substantive argument that the grant of summary judgment denied him due process." To the extent that this Court holds that Kirkland, a pro se appellant, did not make a

"substantive argument" on these issues in his brief, such holding is contrary to the holding of the Supreme Court in *Conley v. Gibson, 355 U. S. 41, 45-46 (1957)* and *Haines v. Kerner, 404 U. S. 519, 520, 521 (92 SC 594, 30 LE2d 652),* and *Watson v. Ault, 525 F.2d 886 (5th Cir.1976).* To require a pro se appellant with an 11th grade education to plead his case at the level of a professional appellate lawyer is "arbitrary and unreasonable...and unjust" and violates 5th Amendment Due Process. See *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.*

A Panel holding, such as this, is precisely why the 7th Amendment should be strictly adhered to.

The Panel in reaching its conclusion in Section IV, violated the 10th Amendment, encroached on the sovereignty of the state of Georgia and deprived the Plaintiff of 5th or 14th Amendment Due Process contrary to the U.S. Supreme Court's holding in *Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145 (1932);* and the Georgia Supreme Court's holding in Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003) wherein that court complains at P.86-87 that this Court has "erroneously interpreted" its public policy at least twice.

The Panel's holding in Section V conflicts with the Supreme Court in *Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).* Guardian's counsel filed neither his motion to extend nor his answer till after the deadline for filing the answer. It appears that the Panel is trying to obfuscate this issue by claiming that it was only the answer that was filed one day late.

The Panel's holding in Section VI, violates the 10th Amendment, encroaches on the sovereignty of the state of Georgia and deprives Kirkland of 14th Amendment Due Process contrary to the Supreme Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).*

The Panel's holding in Section VII deprives Kirkland of the plain language of 28 USC 144; and, 5th Amendment Due Process of Law.

The panel's holding in Section VIII deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney for his case, of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue and then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding also conflicts with *Foman v. Davis, 371 U.S. 178 (1962).*

The Panel's holding in Section IX deprives a 100% disabled, both mentally and physically, litigant, who attempted but could not find a attorney for his case, of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96* by allowing the trial court to issue and then strictly enforce, a scheduling order, that is not even "mandated" by congress. The holding is also contrary to Congressional intent.

The Panel in Section XII has used Florida State judge-made law to deprive Kirkland of his constitutional right to Art. III, Sec. 2, Para.1: "between Citizens of different States"; and his 7th Amendment right to trial by jury in a diversity action in federal court contrary to the Supreme Court's holding in *Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).* The panel's holding is arbitrary and unreasonable, and thus deprives Kirkland of 5th Amendment Due Process, in that it required Kirkland to self-diagnose both his Post Traumatic Stress Disorder and its co-morbid conditions of Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) when no doctor could.

SECTION II.

I made an expansive argument at P.10-P.18 of Appellant's brief regarding adhering to the plain language of the 7th Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Definition of Jury Nullification, Black's Law, 8th Edition:

> *jury nullification.* A Jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

The Founding Fathers were aware of jury nullification. They were also aware of judge nullification. James Madison was a lawyer. Based on the plain language of the 7th Amendment, The Founding Fathers obviously believed jury nullification to be a righteous deed and judge nullification to be an iniquitous evil. *Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913)* is an example of jury nullification. Twelve learned men of 1913 were not stupid enough to believe that Slocum was technically covered under the life insurance contract. They simply believed that it was arbitrary and unreasonable to expect Mrs. Slocum to get a legally binding signature on a "blue note" from a man who was so mentally and physically disabled that he died within four days. Jury nullification. Reasonable, just, due process.

Exxon v. Alabama is an example of judge

nullification that cost the people of the state of Alabama 3.5 billion dollars. In *Exxon,* the company filed for declaratory judgment shortly after it was caught with "irregularities" in royalty payments. A jury twice awarded the state of Alabama punitive damages for fraud. Both verdicts were overturned on appeal, the first for an evidence violation. In the second appeal, the Alabama Supreme Court overturned the punitive damage award on the grounds that Exxon had not defrauded Alabama because it had been caught and had to give the $50,000,000 in "irregularities" back. How Absurd. The whole case turned on "scienter." Did Exxon know that its reading of the lease was not reasonable, did it know its reading of the lease was a fraud. The jury decided that it did. Should have been the end of the enquiry. Judge nullification. An arbitrary and unreasonable confiscation of the property of the state of Alabama. See Sue Bell Cobb's dissent *Exxon v. State of Alabama, 986 So.2d 1093, 1134 (2007).*

In passing, I am descended from Richard Cobb "The Gallant Scot" and may be a blood relative of Chief Justice Cobb's husband and children.

Federal criminal defendants are entitled to jury nullification. Per the plain language of the 7th Amendment, Kirkland is entitled to a jury trial in federal court where the jury may in fact engage in *jury nullification.* Per the 7th Amendment, only a Civil Grand Jury could decide a motion for summary judgment in a federal court.

Kirkland at P.7 of Appellant's Reply Brief:

> "It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease." *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001).*

Lane, under Florida law, is factually equivalent to

this case and also conforms to Due Process. Anything else is "arbitrary and unreasonable" and repugnant to due process per AMERICAN LAND CO. v. ZEISS in Error #3 below.

The Panel simply ignored Kirkland's citation of *Lane*. For a judge to simply ignore an argument and citation in any court, fail to take up and refute it, is NOT a proper process and thus deprives a litigant of 5th Amendment Due Process. Jude nullification is often accomplished by simply ignoring arguments and citations that cannot be refuted without drawing attention to a case. As one experienced Georgia appellate lawyer remarked, "so erroneous as to arouse suspicion."

Kirkland at P.8 of Appellant's Reply Brief:

I intended a further discussion of summary judgment being repugnant to the 5th, 7th and 14th Amendments, requiring 1,570 words. I was confined to 7,000 words. This ground was also covered extensively in a motion for reconsideration (Doc.57).

In closing: "The first maxim of a man who loves liberty, should be never to grant to rulers an atom of power that is not most clearly and indispensably necessary for the safety and well being of society." -- Richard Henry Lee, great-uncle of Robert Edward Lee and a signer of The Declaration of Independence.

SECTION IV.

As a first look, can substantive law in any state be used in Fed.R.Civ.P. 56, summary judgment, to decide sufficiency of the evidence? Rule 56 is procedural in federal court and must comply with the 5th & 7th Amendments. Judge-made state law does not, at present, have to comply with the 7th Amendment. Compliance with the 5th Amendment on Rule 56 would evoke precedent in this Court and rulings from

other circuits.

Kirkland's Reply Brief P.17-18:

"There is considerable authority from other jurisdictions that a cause of action does not accrue under such circumstances **until the plaintiff discovers or with reasonable diligence should have discovered** not only the injury but the cause of the injury. See R. J. Reynolds Tobacco Co. v. Hudson, 314 F2d 776 (5th Cir. 1963); Miller v. Beach Aircraft Corp., 204 Kan. 184 (460 P2d 535) (1969); Wiggington v. Reichold Chemicals, Inc., 133 Ill. App. 2d 776 (274 NE2d 118) (1971); Breaux v. Aetna Cas. &c. Co., 272 FSupp. 668 (E. D. La. 1967); Goodman v. Mead Johnson & Co., 388 FSupp. 1070 (D. N.J. 1974); Thrift v. Tenneco Chemicals, Inc., 381 FSupp. 543 (S. D. Tex. 1974); Gilbert v. Jones, 523 SW2d 211 (Tenn. Ct. App. 1974); G. D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22 (122 Cal. Rptr. 218) (1975); Allen, Roman v. A. H. Robins Co., Inc., 518 F2d 970 (5th Cir. 1975) (Tex.); Raymond v. Ely Lilly Co., 117 N.H. 164 (317 A2d 170) (1977); Harig v. Johns-Manville Products, 284 Md. 70 (394 A2d 299) (1978); Insurance Co. of North America v. Forty-Eight Insulations, Inc., 451 FSupp. 1230 (E.D. Mich. 1978); Schiele v. Hobart Corp., 284 Or. 483 (587 P2d 1010) (1978)." *KING v. SEITZINGERS, INC. et al., 62653 (160 Ga. App. 318) (287 SE2d 252) (1981).*

This Court must adhere to precedent from The 5th Circuit.

Can judge-made law in Florida or Georgia trump 5th Circuit precedent regarding the discovery rule. Can judge-made law in either state force Kirkland to use his broken brain to self-diagnose his broken brain, force him to self-diagnose PTSD and its co-morbid conditions of Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) in order to report them to an insurance company?

See Kirkland's attached affidavit concerning when

he was diagnosed with a disabling condition of any kind.

The panel cites *Reliance,* a 1940 case, and *N. Am. Ins. Co.,* a 1909 case. Is anyone watching this? Both cases are so out of date that they have absolutely nothing to do with current law. But, *Reliance* does enunciate the discovery rule:

> "It seems to be settled law in Florida that a default in serving notice or proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or unreasonable and the insured has not failed to use due diligence."

Reliance Life Ins. Co. of Pittsburgh, Pa. v. Lynch. (197 So. 723, 724) (1940).

Kirkland could not report his disability to the insurance company until he was diagnosed. Guardian has never argued in any court that Kirkland did not exercise "due diligence."

Again the Panel has deprived Kirkland of 5th Amendment Due Process by totally ignoring his argument. The Panel does not mention that Kirkland's Reply Brief argued at P.10-P.21, citing a dozen authorities, that Florida's judge-made law [see *Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1287 (S.D.Fla.2001)]* presumes prejudice and thus is contrary to Georgia's public policy. Georgia's judge-made law applies the discovery rule.

Georgia's law:

> The time limitations in policies of insurance requiring a report of incident 'as soon as practicable' are subject to a factual determination. 'The questions of the sufficiency of the excuse offered, and the diligence of the beneficiary in giving the notice after the removal of the

disability, are generally questions of fact, to be determined by the jury, according to the nature and circumstances of each individual case.' North American Accident Ins. Co. v. Watson, 6 Ga. App. 193, 196 (64 SE 693); Pilgrim Health &c. Ins. Co. v. Chism, 49 Ga. App. 121 (3) (174 SE 212); Hulme v. Mutual Benefit &c. Assn., 60 Ga. App. 65 (2 SE2d 750).

When the testimony of record indicates that the first time any substantial evidence of a claim came to the attention of the principal insured he notified the agent as indicated in Division 1 of this opinion, about 19 months after occurrence of the incident giving rise to the claim, it was not error to submit the issue of reasonableness of excuse to the jury, and the jury finding was supported by the evidence.

NORFOLK & DEDHAM MUTUAL FIRE INSURANCE COMPANY v. CUMBAA., 47646.
128 Ga. App. 196, 198-199 (2) (196 SE2d 167) (1973).

Kirkland specifically asked the Panel at P.20 of the Reply Brief to certify a question to the Georgia Supreme Court. Instead the Panel actually cites *Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003)* wherein the Georgia Supreme Court complains of previous "public policy" decisions made in its behalf. *Convergys* cites:

Since the injured party in this case is a Georgia resident, compare Cunningham v. Equitable Life Assur. Society of the United States, 652 F2d 306 (1) (2d Cir. 1981), we likewise reject Federal's argument that we should afford comity to Florida's public policy in deterring aggravated conduct in that state by disallowing insurance coverage for punitive damages. Florida's public policy is not paramount. This case involves a Georgia corporation's liability to a Georgia resident, so the public policy of Georgia is superior to that of Florida. See General

Motors Corp. v. Nat. Auto Radiator Mfg. Co., 694 F2d 1050 (6th Cir. 1982); Andrews, supra. Georgia's public policy concerns are the protection of both the injured party and the insured. See GEICO, supra. This case, as others, turns on its own particulars.

FEDERAL INSURANCE CO. v. NATIONAL DISTRIBUTING CO., INC.; and vice versa, A91A1709, A91A1710 (203 Ga. App. 763) (2) (417 SE2d 671) (1992).

Pursuant to *Federal,* Georgia's law holds that Guardian is a resident Corporation:

> Additionally, in Allstate Ins. Co. v. Klein, 262 Ga. 599 (422 SE2d 863) (1992), the Supreme Court of Georgia examined the definition of nonresident in the Georgia Long Arm Statute (OCGA 9-10-90) and held that "a corporation which is 'authorized to do or transact business in this state at the time a claim' arises is a 'resident' for purposes of personal jurisdiction over that corporation in an action filed in the courts of this state. As a resident, such a foreign corporation may sue or be sued to the same extent as a domestic corporation." Id. at 601, n. 2 and accompanying text.

Harry S. Peterson Co., Inc. v. National Union Fire Insurance Co., A93A0564. (209 Ga. App. 585) (434 SE2d 778) (1993)

Federal is the closest Georgia's supreme court has come to the circumstances of this case, though it is not precise enough. I would ask the Court again to certify this question to The Supreme Court of Georgia.

The panel has deprived Kirkland of his 10th Amendment right to live in Georgia under its constitution and its laws, free of federal interference; and as well encroached on the sovereignty of the state. The holding also conflicts with The Supreme Court in *Bradford Electric*

Light Co., Inc. v. Clapper, 286 U.S. 145 (1932); and the Georgia Supreme Court's holding in *Convergys Corp. v. Keener (582 S.E.2d 84, 86) (Ga. 2003).*

SECTION V.

The Panel cites *Pioneer* for the proposition that a litigant may file his motion to extend the time to answer one day after the deadline to file the complaint. *Pioneer* itself cites *Re South Atlantic* and *Klapprott v. United States:*

> Thus, in In re Underground Utility Construction Co., 35 B.R. 588 (Bankr.S.D.Fla.1983), the court held that a creditor had failed to show "excusable neglect" for filing his claim three days after the bar date where the untimely filing was the result of his failure to mail his claim to the proper address. *In Re South Atlantic Financial Corp., 767 F.2d 814, 817 (1985).*

The Panel's holding is contrary even to *In Re South Atlantic.* Moreover, comparing a late filing in a bankruptcy case to the late filing of a complaint is apples to oranges. Answering a complaint is governed by the Federal Rules of Civil Procedure. In *Klapport* below, the Supreme Court held that in order to show excusable neglect under Fed.R.Civ.P. 60(b), Klapport had to be destitute, and in jail:

> For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings.

Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949).

Defendant's counsel was neither destitute nor in jail at the time that he inadvertently and incorrectly marked

his desk calendar. The Panel's holding conflicts with the Supreme Court. The Supreme Court has NEVER ruled that a defendant may file his motion to extend one day after the deadline for the answer. If they had, the Panel would have cited the case.

SECTION VI.

The Panel cites *Esfeld* for the proposition that Guardian did not have to adhere to the substantive law of the state of Georgia, OCGA 9-10-111. *Esfeld* at page 1306 cites *Gasperini:*

> Informed by these decisions, we address the question whether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court"? Id., at 468, n. 9.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996).

Failure to apply Georgia's Substantive law, OCGA 9-10-111, in federal court discriminates "against citizen[s] of the forum state," Kirkland; and, made Guardian "choose the federal court" because under OCGA 9-10-111 an officer of the corporation would have to swear that no "interstate fraud," Mail and Wire fraud was committed.

SECTION VII.

The Panel at page 9: "a district judge's decision on whether to recuse himself." The Panel is ruling as if Kirkland filed under 28 USC 455 but admits that Kirkland actually filed under 28 USC 144. The Panel cites *Hamm:*

Two statutes govern the recusal of a federal district judge. 28 U.S.C.A. §§ 144, 455. . Section 144 provides for recusal when a party files a timely and technically correct affidavit and motion alleging the judge before whom the matter is pending is personally biased or prejudiced against him or in favor of an adverse party. Section 455 sets forth a general rule that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned, 28 U.S.C.A. § 455(a), and also several specific situations in which a judge must do so. 28 U.S.C.A. § 455(b).

The plaintiff in this case invoked neither statute in the district court....

Hamm v. Members of BD. of Regents of State of Fla. 708 F.2d 647, 651 (1983).

As the Panel admits, Plaintiff Kirkland invoked 28 USC 144 in the district court. Bias does not have to be proven. Recusal is "mandatory" and "automatic" if the affidavit is "technically correct." See *U.S. v. Sykes, C.A.7 (Wis.) 1993, 7 F.3d 1331.* See also Brotherhood of *Locomotive Fireman and Engineman v. Bangor & A.R. Co., C.A.D.C.1967, 380 F.2d 587.* The Panel's holding has deprived Kirkland of the plain language of 28 USC 144; and, 5th Amendment Due Process.

SECTION VIII.

Kirkland's Reply Brief at page 22:

Kirkland's Motion (Doc.26). His Reply (Doc.41,P.2-8) cites seven authorities, most particularly the Middle Districts own case *Cowart v. Metropolitan Life Ins. Co., 444 F. Supp. 2d 1282, 1295 (M.D. Ga. 2006)* granting plaintiff's motion to amend where defendant was "on notice" of a potential claim since the inception of the

lawsuit.)."

The panel cites *Smith*. This case is distinguishable from *Smith* for the following reasons: Smith agreed to the scheduling order, Kirkland had it forced on him while he moved the district court for time to find an attorney. Smith was not looking for an attorney. Smith did not file in state court in ignorance of a federal removal statute. Smith had been working and was not 100% disabled both mentally and physically. In *Smith,* the court did not rule on his motion but reserved it and summary judgment on the main claim made the motion moot. Kirkland filed both the motion and the amended complaint at the same time.

At page 1366 *Smith v. School Bd. Of Orange County (487 F.3d 1361) (11th Cir. 2007)* cites *Sosa:* "The record makes clear that Sosa's failure to comply with the court's scheduling order resulted from a lack of diligence in pursuing her claim." *Sosa v. Airprint Systems, Inc. (133 F.3d 1417, 1419) (11th Cir. 1998).*

Sosa was represented by counsel. I showed no "lack of diligence," just complete inability due to disability and not being a lawyer.

Notes of the Advisory Committee on 1983 amendments to Fed.R.Civ.P. 16:

Para.2: "In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome."
Para.3: "Second, the result frequently is nothing but a formal agreement on minutiae."
Para.4: "When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. ...But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case."
Para.5: "However, although scheduling and pretrial

conferences are encouraged in appropriate cases, they are not mandated."
Subdivision (e), Pretrial Orders, para3: "Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, e.g., Clark v. Pennsylvania R.R. Co., 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next."

To issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically, Plaintiff, a scheduling order, that was not even "mandated" by congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.* Putting unnecessary restrictions on amending a complaint also conflicts with *Foman v. Davis, 371 U.S. 178 (1962).*

If both this error and summary judgment are reversed, Kirkland can then pursue the entirety of his claim.

SECTION IX.

The Panel attempts to argue that it is my *pro se* status that prevented me from "litigating" this case. IT IS MY DISABILITY. I also missed the deadline for filing Record Excerpts in this Court. See my FORTY-ONE count affidavit in my Motion to Reinstate for how my multiple disabilities affect my ability to function.

Here again, to issue and then strictly enforce on Kirkland, a 100% disabled, both mentally and physically,

Plaintiff, a scheduling order, that was not even "mandated" by congress, is "arbitrary and unreasonable...and unjust" and deprived him of 5th Amendment Due Process of law contrary to the U.S. Supreme Court's holding in *American Land Co. v. Zeiss, 219 U.S. 47 (1911) at P.96.* This holding is also contrary to Congressional intent.

If both this error and summary judgment are reversed, Kirkland can then pursue the entirety of his claim.

SECTION X.

The Panel states that Kirkland's brief was filed on August 13th, 2007. It is my recollection that Guardian did not move the district court even by the September 2nd, 2007 deadline for an extension of time within which to file their brief.

SECTION XI.

Kirkland specifically raised the argument concerning RICO at #10 at P.27-28 of Appellant's Initial Brief asking the Court to review his motion for summary judgment, specifically the affidavit. The Panel cites *Four Seasons* which in turn cites *APA Excelsior III L.P.:* [W]e do not consider claims not raised in a party's brief initial brief and made for the first time at oral argument." *APA Excelsior III L.P. v. Premiere Technologies (476 F.3d 1261, 1269) (11th Cir. 2007).*

Kirkland raised the argument in his "initial brief."

Regarding Notice of Claim, the Panel cited *Nat'l Gypsum,* a 1982 surety bond case, from the Supreme Court of Florida and completely distinguishable from this case.

More on point is *American,* The Florida Second District Court of Appeal:

> '[A]s soon as practicable' has been construed to mean that notice is to be given with reasonable dispatch and within a reasonable time *in view of all the facts and*

> *circumstances of the particular case.* ...[It] being frequently stated that prejudice is presumed under these circumstances. *This does not mean upon a showing of delay, alone, the insurer walks out of court free of potential claims.*

American Fire and Casualty Co. v. Collura (163 So.2d 784, 792) (1964).

Precisely on target is *Lane* originally cited by Guardian without a careful reading:

> It will be assumed, for the purposes of this motion only, that it was not 'reasonably possible' for him to give notice of his claim until January 1996, when his symptoms were first diagnosed as Grover's Disease.

Lane v. Provident Life & Accident Ins. Co., 178 F.Supp.2d 1281, 1286-1287 (S.D.Fla.2001). The United States District Court for the Southern District of Florida encompasses Miami-Dade County where the contract was delivered in 1984.

Under Florida law it was not "reasonably possible" for me to give notice to Guardian until my symptoms were first "diagnosed" as Post Traumatic Stress Disorder or its co-morbid conditions of Electro Magnetic Hypersensitivity and Multiple Chemical Sensitivity. My disability began in 1993, I immediately informed Guardian in 2004 when I was first diagnosed with any disabling condition. See my affidavit attached to this petition.

The Panel engages in a bit prevarication by stating "Kirkland knew that he was suffering from a number of physical symptoms." None of those symptoms however, while seeing numerous doctors, and exercising due diligence was ever diagnosed.

I have encountered much adversity in my life. I have been beaten in the street by members of Georgia law

enforcement while I was handcuffed. But perhaps the worst beating of all is the beating that I have taken in Georgia's courts.

CONCLUSION

Mr. Justice Story:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . .

Parsons v. Bedford, 3 Pet. 433, 446, 7 L. ed. 732, (1830).

Respectfully submitted,

P.O.B. 773
Hull, Ga. 30646
706.788.3158

s/ Dwain Lee Kirkland

Dwain Lee Kirkland, Pro se

9/9/2009

Date

AFFIDAVIT OF DWAIN LEE KIRKLAND SUPPORTING APPELLANT'S PETITION FOR EN BANC REHEARING

Before the undersigned, an officer duly authorized to administer oaths, came Dwain Lee Kirkland, who, being duly sworn, deposes and states that all of the following is based on personal knowledge and is true and correct:

My name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

1.

I believe, based on personal knowledge, that Defendant Guardian et al will terminate my disability benefits, without cause, once they are beyond the jurisdiction of this court.

2.

I have suffered from Post Traumatic Stress Disorder (309.81) since the age of at least seven, from Depressive Disorder NOS (not otherwise specified) (311) since the age of eight, and Personality Disorder NOS (not otherwise specified) (301.9) since the age of possibly seven. These mental disorders were not diagnosed until November 2004 when I was forty-nine years old. They were the result of child abuse. I am currently fifty-four. See Count 26 of the original verified complaint, Tab 00 in the Record Excerpts.

3.

I have suffered from adrenal insufficiency since at least the age of fourteen and Chronic Fatigue Syndrome (G93.3), since the onset of my disability in March 1993, except for a period of remission in 2000 due to treatment with N.A.E.T., an allergy elimination technique. See Count 43 of the original verified complaint, Tab 00 in the Record Excerpts.

4.

I am currently receiving, and have received, total disability benefit payments from Defendant Guardian et al since March 2003. I am, and have been, totally disabled throughout the entirety of these court proceedings, both in the district court and this appellate court. The District Court acknowledged that Defendant Guardian has not disputed, with admissible evidence, that I was totally disabled as of March 1993. See the May 5th, 2008 order, Tab 55 of Record Excerpts.

5.

I have an 11th grade education, no formal training in the law; and would never, in my current condition, excepting for the inability to procure counsel, attempt to litigate a case in any court other than traffic or small claims.

6.

I have attempted to find counsel before the filing of this case, after the filing of this case, in the district court, and during the process of these appellate proceedings. I have gone as far a field as East Texas; Pittsburgh, Pennsylvania and Washington, D.C. I have prevailed on both presidential candidates, one vice presidential candidate, and one member of the Senate Judiciary Committee. I have not, at this time, found anyone to represent me.

7.

The first reason for my filing this case pro se was my inability to obtain counsel, the second reason being the possibility of the entire suit being foreclosed by the statute of limitations and the third reason being that a successful pursuit of this action may be the only way for me to avoid homelessness and subsequent death.

8.

I asked for and was granted one extension of time in the trial court. missed three deadlines and was penalized for them all.

9.

Defendant Guardian et al asked for numerous extensions, answered the complaint after the deadline, without filing a motion for an extension till after the deadline, missed two other deadlines and was forgiven for them all.

10.

My condition has never been good. I have been totally or residually disabled since March 1993, a period of 15 years.

11.

I have not left the state of Georgia since I arrived here in November 2002.

12.

I have rarely, in the past six years, traveled outside the adjoining Georgia counties of Madison, Clarke, Oconee, Franklin and Banks.

13.

Some of the bedclothes on my bed have not been changed since the beginning of winter 2007.

14.

None of the clothes I am currently wearing have been changed in 3 weeks to a month.

15.

At times during the last three months, I have been unable to take a bath or shower for ten days.

16.

My definition of "emotional exhaustion" is when I completely lose the will power to pursue a given matter and begin to fear that if I continue in that same direction, something inside of me will break.

17.

My definition of "physical exhaustion" is when I become so unsteady on my feet that I am afraid that, if I do not go somewhere and sit or lie down, I will fall and injure myself.

18.

I suffer from both emotional and physical exhaustion on a daily basis.

19.

My anxiety disorder, Post Traumatic Stress Disorder, is the cause of my chronic fatigue. I discovered this within the last ten days. I have never, to my knowledge, since the onset of my total disability, been diagnosed or alluded to by my own healthcare providers as being delusional.

20.

At present, a good week for me consists of some activity on Monday, Tuesday, Thursday and Friday interspersed with naps and bed rest; and naps and complete bed rest on Wednesday, Saturday and Sunday.

21.

At present, a mediocre week for me consists of some activity interspersed with naps and bed rest and the ability to get out of bed and feed myself when I'm hungry. Within the last three weeks, I did however consider calling 911 on one occasion because I was unable to go to the grocery store two miles distant to acquire food.

22.

At present, a bad week for me consists of almost no activity, almost exclusive naps and bed rest.

23.

Almost all my meals are canned or prepackaged. I rarely cook anything except for popcorn and eggs. I have a folding chair in front of the stove should I need to sit down.

24.

I am heterosexual. I have no wife or girlfriend. I have had no significant contact with a member of the opposite sex since I moved to Georgia in 2002.

25.

I filed the original complaint in Athens-Clarke county Georgia state court. I had no knowledge of the federal removal statutes. I have knowledge of state court pleading and appeals and certiorari to the Supreme Court of the United States. Prior to this case, I had never been in a federal court. Federal court pleadings and appeals are two to three times as complex and labor intensive as state court.

26.

At the outset of this case, I was aware of my worsening condition and my physical limitations to filing in both the trial and this appellate court. From October 20th, 2008 to November 4th, 2008, I attempted simultaneously via fax and phone to find someone to represent me in a 42 USC 1983 state court action and in this court. It was both very emotionally and physically draining to be rebuffed time and time again.

27.

Pursuant to Counts 1 to 26 above, I at all times during the course of the trial court proceedings and this appeal endeavored in good faith and to the utmost of my ability to meet the filing requirements of both courts. I especially endeavored to file the brief and record excerpts, as soon as I was physically able, in order not to prejudice the Defendants in any way.

28.

I referred to Dr. Kirk Melville, reported to be the great-great grandfather of "Moby Dick" author Herman Melville in Count 41 of my affidavit supporting my motion to reinstate and file out of time in this Court. He practices medicine in Oconee county, Watkinsville Georgia. I first saw him on May 25th, 2009. He diagnosed me with adrenal insufficiency and Chronic Fatigue Syndrome (G93.3), on June 17th, 2009 and began treatment, due to my sensitivity to drugs and chemicals with Cordyceps, a natural food supplement, and Cortisol Manager™ (CM), an herbal compound. After taking CM for five days, I completely lost my ability to function and had to discontinue it and use only Cordyceps for five days to build myself up, and then took one CM per day rather than the two prescribed. I eventually took one Cordyceps and one CM twice daily to offset each other. I saw Dr. Melville again on July 20th, 2009. He ordered blood antibody tests for Epstein-Barr and Cytomegalovirus. I was later found to be negative on both. On or about July 24th, 2009, I developed obvious trembling in both hands. I recognized it as an "artificial deficiency" created by the herbal supplement. I had experienced a similar situation in 2005 when an M.D. intravenously fed me with vitamins and minerals but not trace minerals. The herb in question had only a small number of compounds so I was able with a book, *Prescription for Nutritional Healing*, to identify which phytochemical compound had caused the "artificial deficiency." I was then able to isolate

a compound in the same family to stop the hand trembling. Over the course of the next ten days, this happened again on two more occasions: a sensation of internal trembling from sternum to vagus nerve, and an extreme mental fatigue. Each time I was able to locate a phytochemical and herb to militate against the symptoms. At the end of this time, I was still bingeing on pizza and ice cream for the mineral Germanium in spite of using Siberian Ginseng for the same reason. I eventually surmised that I was using food and Ginseng in an attempt to end run another deficiency. Looking back to vitamins and minerals, I realized that in all my hair-mineral analysis supplementation since 2003, I had somehow missed the B-complex vitamin Choline, as an individual supplement though I had individually supplemented with both PABA and Inositol. I acquired an herb high in Choline, and Lecithin at Walmart, and began supplementation. For the first time ever, I began to slightly improve. The Central Nervous System (CNS) uses Choline as a buffer when the three CNS enzymes mentioned above reach a certain stage of depletion. Robbing Choline from its duties in assimilating other vitamins and minerals is what causes Chronic Fatigue Syndrome (G93.3). I then identified the three "artificial deficiency" symptoms (hand trembling, sensation of internal trembling, extreme mental fatigue), as being caused by Central Nervous System (CNS) enzyme depletion. I do not know which enzymes are depleted but I do know which herbal compound supplements those enzymes. Thus I have a cure though no absolute theoretical understanding of the disease. Within the last ten days, I identified the internal trembling sensation from sternum to vagus nerve as being the same enzyme deficiency that causes both my Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH). I eventually realized through further study and comparison of my illnesses that all anxiety disorders, all inflammatory

disorders (chronic prostaitis and soft tissue injury from which I suffer), all chemical exposures and all electromagnetic field exposures deplete the same CNS enzyme. I have essentially found a possible cure for all aspects of Gulf War Syndrome, except the susceptibility to cancer, which is caused by at least one of the environmental exposures being a carcinogen.

29.

The panel in its holding required me to self diagnose both Post Traumatic Stress Disorder and its comorbid conditions Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) in March of 1993 in order to notify Guardian. I notified Guardian of my disabling hypersensitivity conditions in 2003, the first time that they became apparent to me. None of these sensations had been apparent to me at the outset. In regards to these experiences, Guardian's expert witnesses labeled me possibly "psychotic" but Guardian itself dragged me along for two years believing this but never adjusting my claim or giving me access to their doctors at their expense. Dr. Richard Born diagnosed me with PTSD in November 2004. Dr. Kirk Melville with Chronic Fatigue in June 2009. I have now diagnosed myself with Electro Magnetic Field Hypersensitivity (EMFH) and Multiple Chemical Hypersensitivity (MCH) in August 2009. All of these diagnoses were made after I had notified Guardian of my disability. I cannot impart information to an insurance company that I do not know myself.

s/ Dwain Lee Kirkland

By Dwain Lee Kirkland

09/09/09

Date

s/ Teresa Cooper

Notary Public

My Comm. Expires: Mar 14, 2011

Affix notary seal here:

TERESA COOPER
NOTARY

EXPIRES
Mar. 14, 2011

PUBLIC
MADISON COUNTY
(Stamped)